mate its existence, or to extend judicial favor to it, even where the subject is *res nova*. While its sponsors express "no doubt that a large number of cases may be brought into line with it," this contention is gravely open to doubt. In New York, for example, the test fails completely. *Maher* v. *Hibernia Ins. Co.* (1876) 67 N. Y. 283; *Marsh* v. *McNair* (N. Y. 1888) 48 Hun 117; *Dupre* v. *Thompson, supra.* See also *Ottenheimer* v. *Cook* (Tenn. 1872) 10 Heisk. 309; *Stedwell* v. *Anderson* (1851) 21 Conn. 139; *Easter* v. *Severin* (1881) 78 Ind. 540; *Eldridge* v. *R. R. Co., supra.*

While in numerous cases other and possibly controlling equities are present, *Pittsburgh etc. Co.* v. *Lake etc. Co.* (1898) 118 Mich. 109, 128, it must be conceded that in numerous cases, Chancery has granted relief on one theory or another. The weight of authority to-day, however, is still in accordance with the rule *Ignorantia juris non excusat*, which, a high authority notwithstanding, Scott, Cases on Quasi-Contracts, 406, Note 1, has been recognized from the earliest periods of equity jurisdiction. Doctor and Student, Dial. 1, ch. 26; Dial. 2, ch. 46; *Irnham* v. *Child* (1781) 1 Bro. Ch. 92. The unsound basis of the maxim in principle as applied to civil cases, its contrariety, to Continental thought, 7 COLUMBIA LAW REVIEW 476, and the lack of reason, from the standpoint of natural justice, for allowing relief for mutual ignorance of fact, yet denying it for mutual ignorance of law, explain the illogical and increasing exceptions, of which the two principal cases are characteristic. It is submitted that the true remedy for the unfortunate situation can be found only in legislative action, and the newer and more progressive jurisdictions, alive at once to the strength of *stare decisis* in modern equity, 5 COLUMBIA LAW REVIEW 25, and to the necessity for relief, have not been slow to adopt this solution. N. Dak. Civ. Code § 3854; Cal. Civ. Code § 1578; S. Dak. Civ. Code § 1207; Oklahoma Revised Statutes, Ch. 15, § 20.

LAWFUL POSSESSION BY MORTGAGEE AFTER DEFAULT IN NEW YORK.—Prior to the statute of 1830, which deprived the mortgagee of the right to bring ejectment, the mortgagee's position at law had already become anomalous. *Runyan* v. *Mersereau* (N. Y. 1814) 11 Johns. 534; *Jackson* v. *Crafts* (N. Y. 1820) 18 Johns. 110; *Jackson* v. *Bronson* (N. Y. 1822) 19 Johns. 325. It was, however, asserted or assumed that the mortgagee had a legal estate after default, *Jones* v. *Clark* (N. Y. 1822) 20 Johns. 51; *Jackson* v. *Bowen* (N. Y. 1827) 7 Cow. 13; *Jackson* v. *Minkler* (N. Y. 1813) 10 Johns. 480, and lawful possession might be acquired without the mortgagor's consent in the absence of force, e. g., a mortgagor's tenant after default might attorn to the mortgagee. *Jones* v. *Clark, supra.* No substantial change immediately followed the statute. On the theory that its sole purpose was to save costs to the mortgagor by removing one of the mortgagee's concurrent remedies, the mortgagee's legal estate after default was held to be undiminished thereby. *Phyfe* v. *Reilly* (N. Y. 1836) 15 Wend. 248. Possession unfairly acquired seems early to have been regarded lawful. *Goldsmith* v. *Osborne* (N. Y. 1833) 1 Edw. Ch. 560. In *Van Duyne* v. *Thayre* (N. Y. 1835) 14 Wend. 233, the court mentioned two modes of acquiring lawful possession, consent of the mortgagor or legal proceedings. This decision, standing alone,

would seem to limit the methods previously available, but, taken in connection with *Phyfe* v. *Reilly, supra,* apparently produced no modification. In the latter case the court seems designedly to have used the non-committal expression that possession might be acquired in any legal mode other than action, in place of the more explicit term, legal proceedings. Moreover, contemporaneous cases assumed that the position of the mortgagee as such made methods legal in him which would be illegal in a stranger. For example, in *Fox* v. *Lipe* (N. Y. 1840) 24 Wend. 164, it was considered immaterial whether a sale on foreclosure was good or void, since ejectment would not lie against a mortgagee in possession, although entry upon at least a part of the mortgaged premises seems to have been effected without the mortgagor's consent. In *Winslow* v. *McCall* (N. Y. 1860) 32 Barb. 241, A, the owner of the mortgaged premises, was in possession through his tenant when the senior mortgage was foreclosed without notice to the junior mortgagee. A, subsequently purchased the overdue junior mortgage, and, as mortgagee, his possession through his tenant was held lawful. In reality A, though holding through his tenant, would seem to be in no better position than a tenant at will of the purchaser on foreclosure, and hence unable lawfully to change the character of his possession without the consent of the mortgagor unless the overdue mortgage gave him that privilege. So far as cases dealing directly with ejectment of mortgagees are concerned, Judge Denio's dictum in *Pell* v. *Ulmer* (1858) 18 N. Y. 139, 142, "if the mortgagee obtains possession without force (or fraud?) he is entitled as well since as before the statute to retain possession against the mortgagor," seems to be justified, cf. *Mickles* v. *Dillaye* (1858) 17 N. Y. 80; *Bolton* v. *Brewster* (N. Y. 1860) 32 Barb. 389, 395; *Chase* v. *Peck* (1860) 21 N. Y. 581, 586, and for years, judges continued to repeat loosely that ejectment does not lie against a mortgagee in possession. *Winslow* v. *Clark* (1872) 47 N. Y. 261; *Hubbell* v. *Sibley* (1872) 50 N. Y. 468, 472; *Hubbell* v. *Moulson* (1873) 53 N. Y. 225, 227.

Meantime, cases on collateral questions, involving a consideration of the nature of mortgagor's and mortgagee's interests, rejected Judge Denio's view that the mortgagee has a legal estate after default. Cf. *Packer* v. *Rochester etc. Co.* (1858) 17 N. Y. 283, 287, 295; *Trimm* v. *Marsh* (1874) 54 N. Y. 599. From these decisions, it follows logically that, since the mortgagee is at law a stranger, the acquisition of possession without the mortgagor's consent is unlawful. *Madison Ave. Bapt. Church* v. *Oliver Bapt. Church* (1878) 73 N. Y. 82; *Howell* v. *Leavitt* (1884) 95 N. Y. 617. In *Howell* v. *Leavitt, supra,* the mortgagees, who purchased on foreclosure sale, void as against the mortgagor's infant heirs, evicted the latter's tenant by a writ of assistance. The heirs recovered in ejectment. This case might be supported merely on the ground of entry by force, but it undoubtedly stands for the broader proposition that entry must be with consent. *Townsend* v. *Thompson* (1893) 139 N. Y. 152, apparently adopts the theory that peaceable entry under color of a non-existing right, i. e., under a sale void as against the assignee in bankruptcy of the mortgagor, is lawful. This theory, however, is hardly consistent with the holding in *Howell* v. *Leavitt, supra,* where, also under color of non-existing right,

entry by writ of assistance was unlawful. The real ground of the decision seems to have been the subsequent acquiescence of the assignee. Under what circumstances a mortgagee may acquire lawful possession by inducing the mortgagor's tenant to attorn is still in doubt. It is provided in 1 R. S., Ch. 744, § 3, Laws of 1896, Ch. 547, § 194, that attornment after forfeiture shall not be void. A literal construction would lead to the anomalous result that, if by chance there be a tenant in possession, a mortgagee may acquire lawful possession without consent, whereas under any other circumstances consent is essential. The courts may, in view of the change in the nature of the mortgagee's estate since the original enactment of the statute, construe "after forfeiture" to mean "after foreclosure," or in any event require the mortgagor's consent.

Logically, also, a mortgagee in possession in one character may not without the mortgagor's consent assert possession as mortgagee. The first case arising after the triumph of the mortgagor's estate in *Trimm* v. *Marsh, supra,* was, however, a hard case where the equities were all with the mortgagee who had entered under a void contract of purchase. The court, refusing to eject the mortgagee, asserted that the mortgagee's possession was lawful though not given under the mortgage or with a view thereto. *Madison Ave. Bapt. Church* v. *Oliver Bapt. Church, supra.* A recent case, *Barson* v. *Mulligan* (N. Y. 1908) 84 N. E. 75, carefully limits the application of this decision. It was held that the lessee of a tenant for life was not entitled to retain possession by virtue of an overdue mortgage purchased before, or shortly after, the death of her lessor. The court affirmed *Howell* v. *Leavitt, supra,* and laid down the rule that a mortgagee in possession as tenant, may not change the character of his possession to that of mortgagee without the mortgagor's consent. Express repudiation of *Winslow* v. *McCall, supra,* was avoided by treating the conclusion of law, i. e., the legality of the possession, as a finding of fact. The distinction between the principal case and *Madison Ave. Bapt. Church* v. *Oliver Bapt. Church, supra,* is narrow and seems to consist merely in that one in possession under a void deed occupies an ambiguous, ill-defined position, not regarded as inconsistent with possession under the mortgage, whereas the relation of tenant and landlord is well settled in character, and possession under the mortgage is clearly inconsistent therewith. Whether *Madison Ave. Bapt. Church* v. *Oliver Bapt. Church, supra,* will be restricted to its facts, is uncertain, but desirable; for a mortgagee is sufficiently protected in equity. The decision in the principal case is a real step in advance in that it defines more accurately the right of a mortgagee to retain possession once lawfully acquired. If he enter as tenant, express trustee, or, perhaps, as vendee under a contract of sale, the mortgagor's consent is essential.

THE RELATION OF BROKER AND CUSTOMER IN MARGIN TRANSACTIONS.—Agitation concerning transactions on margin makes a recent decision of the Supreme Court especially timely. Securities were bought for a speculator on "margin," under an agreement permitting the broker to pledge the securities carried in his general loans. Within four months of proceedings in bankruptcy against the broker, the securities were redeemed